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IN THE

Supreme Court of the United States

OCTOBER TERM, 19____

No. 1202

WALTER GENE GWIN, BARTO L. BROWN, JR.,
AND EARL W. BROWN d/b/a
MOBILE SUPPLY COMPANY,

Petitioners

versus

LIBERTY MUTUAL INSURANCE COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

No. _____

WALTER GENE GWIN, BARTO L. BROWN, JR., AND EARL W. BROWN, d/b/a MOBILE SUPPLY COMPANY,

Petitioners

versus

LIBERTY MUTUAL INSURANCE COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Walter Gene Gwin, Barto L. Brown, Jr., and Earl W. Brown *d/b/a* Mobile Supply Company, pray that a writ of certiorari issue to review the *judgment and order* of the United States Court of Appeals for the fifth circuit on an appeal from a judgment of the United States District Court for the Southern District of Alabama, entered *May 5, 1965* ordering, adjudging and decreeing that the policy of insurance, that is the subject matter of this proceeding for a Declaratory

Judgment was in full force and effect and under the terms thereof the Respondent, Liberty Mutual Insurance Company must represent the petitioners Mobile Supply Company in any action arising out of the accident in question.

OPINIONS BELOW

The opinions below are printed as appendices to this petition. The opinion of the Fifth Circuit Court of Appeals dated the 27th day of December, 1966, is reported at 370 F 2nd 297 and is at Appendix, p. 8;

The opinion of the District Court dated the 5th day of May, 1965, and appears at Appendix, p. 17.

JUDGMENT SOUGHT TO BE REVIEWED

The judgment entered by the Court of Appeals on December 27, 1966, at Appendix, p. 6.

JURISDICTION

The jurisdiction of this Court on petition for certiorari is invoked under 28 U.S.C., Sec. 1254 (1). The judgment of the Fifth Circuit Court of Appeals in this case was first dated December 27, 1966, and thereafter entered on January 20, 1967.

QUESTION PRESENTED

Whether, in reviewing the Findings of Fact, Conclusions of Law, and Judgment of the District Court, in which it was ordered, adjudged and decreed that the insurance policy in question was in full force and effect

the Court of Appeals was in error in reversing the District Court.

STATEMENT OF THE CASE

This action was commenced by the appellee insured in the Circuit Court of Mobile County, Alabama and sought a declaratory judgment and decree ascertaining the rights, privileges, duties, and obligations and other legal relations of the parties to this cause under the terms and conditions of the policy of insurance attached to the bill of complaint. The State proceeding was removed on motion of the insurance company to the United States District Court for the Southern District of Alabama on November 26, 1963. The insurance company denied insurance coverage on a complaint filed in the Circuit Court of Mobile County, Alabama on the grounds that the accident, which was the subject matter of the suit against the insured, was not covered under the policy of insurance due to a product liability exception contained in said policy of insurance.

The declaratory judgment proceeding was heard by the District Court and the District Court made its finding of fact, conclusions of law and judgment in favor of the insured and ordered and decreed that the policy of insurance was in full force and effect, see Appendix p. 17. The District Court held that title to an empty freon cylinder involved in an accident and which was owned by E. I. Dupont Company was not goods and products of the insured and did not come under the product liability exception in the insurance policy. The insurance company took timely an appeal to the Court of Appeals for the Fifth Circuit. The Appellate Court

disagreed, see Appendix p. 8, and issued its mandate and opinion reversing the District Court.

PETITIONERS REASONS FOR REQUESTING THE GRANTING OF THE WRIT

Briefly stated the District Court, in its finding of fact, conclusion of law, and judgment adopted the general rules concerning the interpretation of an insurance contract as stated in *Liberty Mutual Insurance Company v. Hercules Powder Company*, Third Circuit, 224 F 2nd 293.

The District Court held that the chattel was owned by a third party, and said chattel was not "goods and products of an insured" as set out in a product liability exception to a general liability insurance policy.

The Fifth Circuit Court of Appeals held that the Hercules Powder case in the Third Circuit was not applicable. This adverse ruling by the Fifth Circuit is erroneous and contrary to the ruling of the Third Circuit in the Hercules case and conflicting with the Sixth Circuit Court of Appeals ruling in *Diversified Products Company v. The Fidelity and Casualty Company* of New York, Sixth Circuit, 355 F 2nd 846, which held that a punch press the property of a third party does not come under the product of exception clause.

The Fifth Circuit's ruling in the instant case makes the Fifth Circuit's holding diametrically opposed to the Third and Sixth Circuits.

The Court of Appeals, committed error in reversing

the District Court and this Honorable court, with respect, should issue a writ of certiorari to review that mandate and order.

Respectfully submitted,

GEORGE E. STONE, JR.
2711 First National Bank Building
Mobile, Alabama

GEORGE F. WOOD
510 Van Antwerp Building
Mobile, Alabama

W. BORDEN STRICKLAND
Of Counsel
315 Van Antwerp Building
Mobile, Alabama

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

No. 22910

D. C. Docket No. CA 3195-63-Civil Action

LIBERTY MUTUAL INSURANCE COMPANY,

Appellant,

versus

WALTER GENE GWEN, BARTO L. BROWN, JR., AND EARL W. BROWN, d/b/a MOBILE SUPPLY COMPANY,

Appellees.

Appeal from the United States District Court for the SOUTHERN DISTRICT OF ALABAMA,

Before TUTTLE, Chief Judge, THORNBERRY and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Walter Gene Gwin, Barto L. Brown, Jr., and Earl W. Brown, d/b/a Mobile Supply Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December, 1966

Court Costs:

Docketing cause, etc. . . . $25.00

Issued as Mandate: Jan. 20, 1967

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22910

LIBERTY MUTUAL INSURANCE COMPANY,

Appellant,

versus

WALTER GENE GWIN, BARTO L. BROWN, JR., AND EARL W. BROWN, d/b/a MOBILE SUPPLY COMPANY,

Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

(December 27, 1966.)

Before TUTTLE, Chief Judge, THORNBERRY and GOLDBERG, Circuit Judges.

THORNBERRY, Circuit Judge: Appellee, Mobile Supply Company, instituted this action for declaratory judgment seeking a determination of coverage as the

named insured under a comprehensive general liability policy issued by appellant, Liberty Mutual Insurance Company. The trial court entered judgment in favor of Mobile Supply, ruling that under the facts of the case coverage was not excluded by the "Exclusion of Products and Completed Operations Hazards" endorsement contained in the policy. We conclude that the trial court erred in this determination for the reasons hereinafter developed.

The pertinent facts underlying this controversy are undisputed. Appellee is engaged in the business of selling heating and air conditioning equipment, including gaseous refrigerants used in servicing air conditioning and refrigeration equipment. Appellee does does not manufacture the refrigerants it sells, but purchases the gases in pressurized cylinders of various sizes from concerns engaged in the business of manufacturing such refrigerants. As a matter of established practice, these manufacturers require distributors such as appellee to pay a deposit of $12 per cylinder, which is refundable when the empty cylinder is returned to the manufacturer. The distributors are not obliged, however, to return the cylinders, and in the event a cylinder is not returned the manufacturer simply retains the deposit. Similarly, the distributors, including appellee, required their customers to pay, in addition to the gas, a deposit of $12 per cylinder which is also refundable if and when the customer returns the empty cylinder. As in the case of the distributor, the customer is under no obligation to return the cylinders. It is standard practice in the trade for distributors to accept a return of empty

cylinders and to refund the $12 deposits regardless of the source from which the customer acquired the cylinders and regardless of the manufacturer who produced them. Likewise, any distributor may return an empty cylinder in good condition to any manufacturer and receive the standard $12 deposit, even though the distributor may not deal in that particular line of refrigerants. The manufacturers then reuse those cylinders which are in good condition.

It is not unusual for one of appellee's customers to have need for an empty cylinder to be refilled by the customer at his own place of business, and in such case, the customer can obtain an empty cylinder from appellee simply by paying the standard $12 deposit. Thus, regardless of whether the cylinder is empty or full, the transaction is handled on the same refundable deposit basis — the customer may either retain the cylinder or return it for the deposit.

In June 1960, Mobile Gas Service Corporation, one of appellee's customers, paid the standard $12 deposit and procured an empty cylinder from appellee, after which time appellee had no further connection with the cylinder. After acquiring the empty cylinder, Mobile Gas Service Corporation changed the valve and filled the cylinder with ammonia gas for use in servicing refrigeration equipment. The cylinder, as modified, was used by Mobile Gas for approximately two years, during which time it was filled and refilled by Mobile Gas numerous times. In July 1962, however, the cylinder exploded, apparently as a result of exposure to the heat of the sun, injuring one Leon Phillips, an employee of Mobile Gas. In July 1963, Phil-

lips instituted in the Alabama state courts a personal injury action against appellee, E. I. Dupont de Nemours & Company, and Kennic Chemical Company, the latter two defendants being the manufacturers and distributors of the cylinder. In November 1963, appellee commenced a suit in the Alabama state court seeking a declaratory judgment that appellant Liberty Mutual had a duty to defend and indemnify appellee against Phillip's claim and any judgment that might be obtained against appellee. The controversy was subsequently removed to the United States District Court for the Southern District of Alabama on the basis of diversity of citizenship.

The insurance policy in issue is styled "Comprehensive General Liability Policy" and contains the usual insuring agreements against bodily injury and property damage, various exclusions, declarations and conditions, and certain endorsements. Included among the endorsements is an "Exclusion of Products and Completed Operations Hazards," the interpretation of which represents the critical issue in this controversy. The endorsement provides in pertinent part as follows:

> (c) Products Hazard — The term "products hazard" means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, if the injury, sickness, disease, death or destruction occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and if such injury, sickness, disease, death or destruction

occurs away from premises owned, rented or controlled by the named insured or on premises for which the classification stated in division 1 of Item 4 of the declarations excludes any part of the foregoing; provided, such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or any property, other than such container, rented to or located for use of others but not sold.

* * * * * * * * *

3. The policy does not apply to the products hazard . . . as defined herein.

It is undisputed that the injury was sustained away from appellee's premises, and the crucial inquiry thus becomes whether the cylinder in question constituted "goods or products manufactured, sold, handled or distributed" by appellee under the products hazard exclusion.

In defense of the trial court's conclusion that the cylinder was not a good or product sold, handled, or distributed by appellee within the meaning of the endorsement, appellee contends that since the empty cylinder was acquired on a refundable deposit basis, the title remainder in the manufacturer and appellee thus transferred only a possessory license. Appellee further urges that the term "good and products" is limited to items sold by appellee or at least acquired to be sold as an integral part of its merchandise. It is asserted that the cylinder in its empty form cannot of itself constitute a good or product,

and being empty, cannot be viewed as a container of the good or product which it normally carries.

Having carefully considered the merits of appellee's contentions, we are nevertheless convinced that the transaction before us was in substance the sale of a good or product within the meaning of the products hazard exclusion of the policy. A review of Alabama law, which governs in this diversity action, indicates that a refundable deposit transaction such as the one here involved constitutes a sale of goods. The Alabama Sales Act defines goods as including "all chattels personal other than things in action or money." Ala. Code tit. 57 § 1 (1960). A sale may be absolute or conditional, § 9(3), and the property in the goods sold passes to the buyer at such time as the parties intend, such intent being determined by the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case. § 24 (1)-(2). The Act further provides that "when goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time . . . " § 25, rule 3(1). In *State v. Reynolds Metal Co.*, 1955, 263 Ala. 657, 83 So.2d 709, the Alabama Supreme Court was called upon to apply these provisions to a transaction similar to that in the instant controversy in a case involving tax liability. The taxpayer was engaged in the manufacture and sale of aluminum cable

and wiring. The cable and wiring were sold on reels and spools which the taxpayer had purchased out of the state. Upon each sale of the cable and wiring, the accompanying invoice listed the price of the reels and spools separately from the price of the cable and wiring. Although the purchaser paid the total amount shown on the invoice, a notation at the bottom of each invoice provided that if the empty spools or reels were returned in good condition within eighteen months the purchaser would be credited for the amount paid for the spools and reels. The taxpayer made no profit on the spools and reels; however, in the event they were returned, they were reused as long as they remained in suitable condition. Accordingly, the taxpayer contended that there had been a sale of the spools and reels as well as the cable and wiring, and *since it had purchased the spools and reels for resale they were not therefore subject to the state use tax.* In opposition, the State argued that no sale of the spools and reels had occurred and that the transaction in substance constituted a scheme whereby the taxpayer would be assured the return of its property, *title to which at all times remained in the taxpayer.* In resolving the issue in favor of the taxpayer, the Alabama Supreme Court reasoned that a sale of the spools and reels had occurred within the contemplation of Section 25, Rule 3(1) of the Sales Act, *supra,* and further recognized that the same result would have been forthcoming even without the statute. See also *Buck v. Commissioner,* 9th Cir. 1936, 83 F.2d 627; *Commonwealth of Massachusetts v. Brandon Farms Milk Co.,* 249 Mass. 531, 144 N.E. 381.

We are of the opinion that the reasoning adopted by

the Alabama Supreme Court in *Reynolds Metal Co.* governs the instant controversy. It is undisputed that appellee, as a matter of convenience to its customers, distributed the cylinders independently of the refrigerants. The empty cylinders, under such circumstances, clearly fall within the definition of "goods," which are defined by the Act to "include all chattels personal other than things in action and money." § 1. Moreover, to view the instant trade practice as involving the mere transfer of a possessory license in the empty cylinder rather than a sale is to disregard the realities of the transaction.[1] Upon paying a deposit, a customer could obtain from appellee an empty cylinder entirely free from any further control by appellee, and free from any obligation to return it. Obviously, neither party attributed any significance to the legal technicalities of retention of title. The customer understood that he could use the empty cylinder as he wished; he could, if he chose,

---

[1]Appellee relies heavily upon the case of *Liberty Mut. Ins. Co. v. Hercules Powder Co.*, 3rd Cir. 1963, 224 F.2d 293, where the court ruled that a similar endorsement did not exclude policy coverage. In that case the insured, while engaged in a program of experimental research, had delivered an aluminum tube to an electro-chemical company for additional processing, after which time it was to be returned to the insured. In the course of additional processing at that company, the tube exploded. Determining that coverage was not excluded under the endorsement with regard to the claims arising out of the explosion, the court reasoned that such endorsements were intended to avoid the type of products liability first developed in *MacPherson v. Buick Motor Co.*, 1916, 217 N.Y. 382, 111 N.E. 1050. The court concluded that such liability was clearly not in question since the tube had not been sent "into the channels of trade for use by others," but remained, at the time of the accident, a chattel owned by the insured to be returned to it at the completion of the processing. In view of such retention of ownership, the court ruled that the tube was not "manufactured, sold, handled or distributed" by the insured within the meaning of the exclusionary endorsement. In the case before us, however, the injured party's claim is plainly couched in terms of products liability in the *MacPherson* sense, and having concluded that the transaction involving the empty cylinder did, in fact, constitute a sale under Alabama law, we find the reasoning adopted by the court in *Hercules* inapplicable to the facts of this case.

throw it away without incurring any further obligation to appellee or the manufacturer, or he could replace the valve and fill the cylinder with any type of refrigerant he wished, as was done in the instant case. In light of these facts, we conclude that the empty cylinders represented goods or products sold by appellee within contemplation of the products hazard endorsement of the policy issued by appellant, and that the personal injury claim arising from such sale is therefore effectively excluded from coverage. Accordingly, the judgment of the district court in favor of the insured is REVERSED.

APPENDIX C

IN THE
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA
IN EQUITY

CASE No. 61,129

WALTER GENE GWIN, BARTO L. BROWN, JR., AND EARL W. BROWN, doing business as MOBILE SUPPLY COMPANY,

Complainant,

versus

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

(Filed: May 5, 1965)

This is an action for a declaratory judgment on a policy of liability insurance, brought by Mobile Supply Company, the named insured, against Liberty Mutual Insurance Company.

FINDINGS OF FACT

1. Mobile Supply Company is engaged in the business of selling heating and air-conditioning equipment, in-

cluding gaseous refrigerants used in servicing air-conditioning units and other refrigeration equipment by air-conditioning service companies and others having a need for such refrigerants.

2. Plaintiffs do not manufacture the refrigerants which are sold by them, but purchase these gases under pressure in cylinders of various sizes from concerns in the business of manufacturing refrigerants and selling them at wholesale to distributors or suppliers, such as Plaintiffs. The manufacturers require the distributors and suppliers to pay a deposit of $12 per cylinder, which is refundable if and when the cylinder is returned to the manufacturer. The distributors and suppliers are not obliged to return the cylinders to the manufacturer, and some are not returned, in which event the manufacturer retains the deposit. In turn, the distributors and suppliers, including Plaintiffs, require their customers to pay, in addition to the price of the gas, a deposit of $12 per cylinder. This deposit, too, is refundable if and when the customer returns the cylinder. The customer may do as he pleases about returning the cylinders, and, like the distributor or supplier, he is under no obligation to return them.

3. The empty cylinders of gas are re-used by the manufacturers when they are returned by the distributor or supplier, assuming that they are in reusable condition at the time. It is standard practice in the trade for the distributors and suppliers to accept a return of empty cylinders, regardless of the source from which the customer may have obtained the cylinder, and regardless of the manufacturer of the cylinder and contents when

last used. Plaintiffs customarily accept cylinders from their customers, and pay them the standard $12 deposit for each cylinder turned in by the customer, even though the customer may have obtained the cylinder from some supplier other than Plaintiffs, and even though Plaintiffs may not sell the products of such manufacturer. This is customary in the business, as any supplier can return an empty cylinder in good condition to the manufacturer, and receive the standard $12 deposit for it from the manufacturer, even though the supplier does not handle that particular line.

4. It is not unusual for a customer of Plaintiffs to want an empty cylinder to be refilled, by the customer, at his own place of business, and in such case the customer may obtain the empty cylinder from Mobile Supply Company by paying the standard $12 deposit. It makes no difference whether the cylinder is empty or full, the deposit is the same, and the transaction is handled on the same refundable deposit basis. In any instance, the customer may retain the cylinder and do with it as he pleases, or return it for the deposit.

5. When a customer obtains a cylinder of gas, or an empty cylinder, from Plaintiffs, whether the Alabama sales tax is charged upon the transaction depends upon whether the customer is a wholesaler or a retailer. If the customer has a wholesaler's tax number issued by the State Department of Revenue of Alabama, qualifying him as a wholesaler for sales tax purposes, no sales tax is charged on the cylinder or, if it is full, its contents. On the other hand, if the customer does not have a wholesaler's tax number, the sales tax is charged by Plaintiffs on the $12 deposit paid for the cylinder whether

it is full or empty. If the sales tax is charged when the customer obtains the cylinder, then he is refunded the tax as well as the $12 deposit if and when the cylinder is returned for refund.

6. Mobile Gas Service Corporation is a customer of Mobile Supply Company, and obtains its bottled refrigerants from them. The cylinder with which we are concerned in this case was obtained by Mobile Gas Service Corporation from Plaintiffs on or about June 7, 1960. The cylinder was obtained for the usual $12 deposit, and $1.50 was paid for the stand. No sales tax was charged either for the cylinder or the stand since Mobile Gas Service Corporation has a wholesaler's tax number.

7. After it had obtained the cylinder from Plaintiffs, Mobile Gas Service Corporation changed the valve and thereafter filled the cylinder with ammonia gas under pressure for use in handling "complaints", that is, in servicing refrigeration equipment. The cylinder was empty when it was obtained by Mobile Gas Service Corporation from Plaintiffs on or about June 7, 1960; and thereafter Plaintiffs had no further connection or contact with the cylinder, nor did Plaintiffs sell or supply any gas that may have been subsequently used to fill the cylinder.

8. The cylinder, as modified, had been in use by Mobile Gas Service Corporation for approximately two years, when, in July 1962, it exploded, apparently as a result of exposure to the heat of the sun, and injured Leon Phillips, who, at the time, was in the employ of Mobile Gas service Corporation. Between the date of its acquisition from Plaintiffs and the explosion injur-

ing Leon Phillips, the cylinder had been filled and refilled with ammonia gas on many occasions by Mobile Gas Service Corporation.

9. On or about July 1, 1963, Leon Phillips commenced his action against Mobile Supply Company, E. I. DuPont de Nemours and Company, Inc., and Kennic Chemical Company, for personal injuries allegedly sustained in the accident.

10. The policy of insurance in question here was first issued by Defendant to the Plaintiffs on June 13, 1960, for a period of one year, and was thereafter reissued annually for successive one year periods on June 13, 1961, and June 13, 1962, and was in full force and effect on July 14, 1962, and throughout the period commencing June 13, 1962, and ending June 13, 1963.

11. The insurance policy in question is styled "Comprehensive General Liability Policy", and consists of the Insuring Agreements, Exclusions, Conditions, Declarations, and certain endorsements, including the "Exclusion of Products and Completed Operations Hazards" endorsement, with which we are primarily concerned in this case. This endorsement provides as follows:

It is agreed:

1. The definition of the term "Products Hazard" appearing in Condition 3(c) of the policy is hereby deleted.

2. The following definitions are added to Condition 3 of the policy:

(c) Products Hazard — The term "products hazard" means goods or products manufactured, sold, handled or

distributed by the named insured or by others trading under his name, if the injury, sickness, disease, death or destruction occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and if such injury, sickness, disease, death or destruction occurs away from premises owned, rented or controlled by the named insured or on premises for which the classification stated in division 1 of Item 4 of the declarations excludes any part of the foregoing; provided, such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or any property, other than such container, rented to or located for use of others but not sold.

(e) Completed Operations Hazard — The term "completed operations hazard" means work completed by or for the named insured, including but not limited to services, material, parts or equipment furnished in connection therewith or incorporated therein, if the injury, sickness, death or destruction occurs after operations in connection with such work have been completed or abandoned and occurs away from premises owned, rented or controlled by the named insured; provided, work shall not be deemed incomplete because improperly or defectively performed or because further work may be required pursuant to an agreement: provided, further, the following shall not be deemed to be "work" within the meaning of this paragraph: (a) pick-up or delivery, except from or onto a railroad car, (b) the maintenance of vehicles owned or used by or in behalf of the insured, (c) the existence of tools, uninstalled equipment and abandoned or unusued material and (d) work for which the classification stated in division 1 of Item 4 of the

declarations specifically includes completed operations. Injury, sickness, disease, death or destruction occurring away from premises owned, rented or controlled by the named insured and arising out of work which has been completed by or for the named insured and which has been put to its intended use by any person or organization, other than another contractor or subcontractor performing operations in connection with the project of which the named insured's work is a part, shall be deemed to arise out of the completed operations hazard.

3. The policy does not apply to the products hazard or the completed operations hazard as defined herein.

CONCLUSIONS OF LAW

1. The Court has jurisdiction in this matter under Title 28 U.S.C., Section 1332.

2. The whole question in this case turns upon the interpretation of the insurance contract made between the parties.

3. The general rule concerning the interpretation of a contract is stated in *Liberty Mutual Insurance Company v. Hercules Powder Company*, 224 F.2d 293:

> "When a party chooses the language which he puts into a form contract, in case of doubt of its effect the general rule is that it is interpreted against him. *Bergholm v. Peoria Life Ins Co.*, 284 U.S. 489."

4. The Court adopts the reasoning of Circuit Judge Goodrich in *Hercules*, supra:

> "Numerous cases have been cited to us. This is a situation, however, where comments of courts on language not identical cannot help us much. And the reason for that is already apparent. Unless particular words have crystalized into a definite legal rule their meaning necessarily varies with time, place, occasion, and the vocabulary of the user."

5. An empty cylinder is not "goods or products." "Goods or products" in this case means "goods or products" sold by Mobile Supply Company or at least acquired to be sold as an integral part of their merchandise, goods and products for merchandising purposes. The container here in question was not "sold" or "handled" by the Plaintiffs so as to be excluded from coverage under the policy of insurance.

6. Even though the container was obtained by Mobile Gas Service Corporation before the insurance policy went into effect, the accident occurred some two years after the issuance of the policy. The leading case of *George W. Deer and Son v. Employers Indemnity Corporation*, 77 F.2d 175, in a similar situation, stated that there was insurance coverage although the kerosene that caused the accident was delivered before the policy went into effect. The accident in the *Deer* case also occurred after the policy was issued.

7. The Court finds that the insurance policy covers the accident involved in this action. The "Products Hazard" and "Completed Operations Hazard" exclusions do not exclude coverage in this case.

8. The Court further finds that the Plaintiffs' at-

torney is entitled to $600.00 for services rendered in this declaratory judgment suit.

Judgment to be entered accordingly.

JUDGMENT

This cause having come on for final hearing on the pleadings and proofs of the respective parties, and having been argued and submitted, and the Court after due deliberation having now entered its Findings of Fact and Conclusions of Law herein, it is

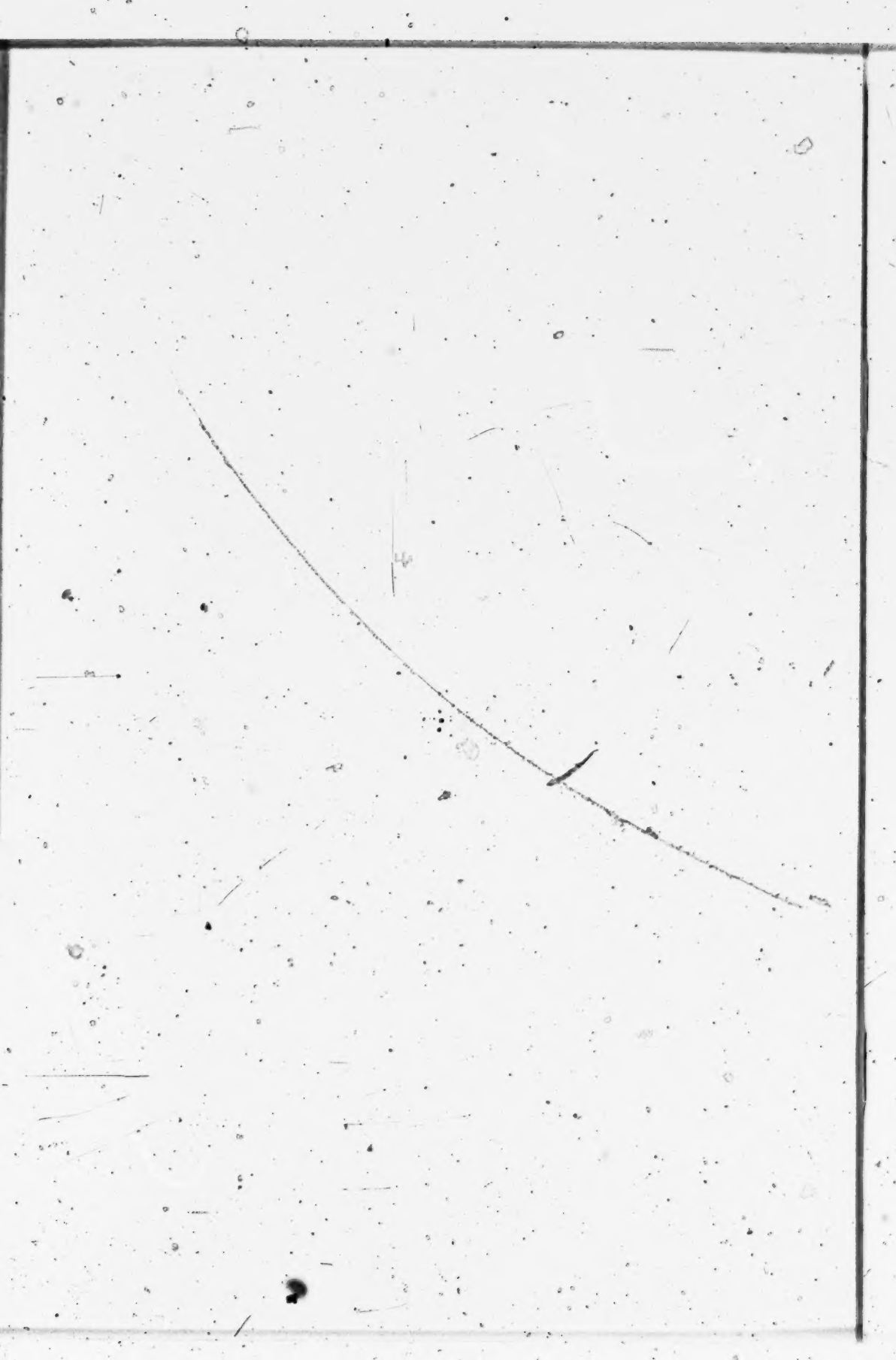
ORDERED, ADJUDGED and DECREED that a judgment is entered in favor of the Plaintiffs. The policy was in full force and effect and under the terms thereof the Defendant must represent the Plaintiffs in any action arising out of the accident in question.

It is further ORDERED, ADJUDGED, and DECREED that the Plaintiffs recover of the Defendant $600.00 for attorney's fee.

Costs are taxed against the Defendant.

Dated 5/5 1965.

DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE.



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IN THE

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OCTOBER TERM, 1966

No. 1202

WALTER GENE GWIN, BARTO L. BROWN, JR., AND EARL W. BROWN, d/b/a MOBILE SUPPLY COMPANY,
Petitioners,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT

GEORGE E. STONE, JR.
2711 First National Bank Bldg.
Mobile, Alabama 36601
Attorney for Petitioners

THOMAS E. TWITTY, JR.
1301 Merchants National Bk. Bldg.
Mobile, Alabama 36601
Attorney for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1202

WALTER GENE GWIN, BARTO L. BROWN, JR., AND EARL W. BROWN, d/b/a MOBILE SUPPLY COMPANY,

Petitioners,

versus

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This is Respondent's brief in opposition to the petition for writ of certiorari in this cause.

STATEMENT OF THE CASE

Petitioners, Mobile Supply Company, instituted this action for declaratory judgment seeking a determination of coverage as the named insured under a comprehensive general liability policy issued by Respondent. The action was originally filed in the Circuit Court of Mobile County, Alabama (R 4), and thereafter removed by Respondent to the United States District Court for the Southern District of Alabama on the ground of diversity of citizenship (R 1-3).

The trial court entered judgment in favor of Petitioners, holding that coverage was not excluded by the "Exclusion of Products and Completed Operations Hazards" endorsement contained in the policy. This judgment was reversed by the United States Court of Appeals for the Fifth Circuit. The opinion of the trial court is reported at 241 F. Supp. 591, and the Court of Appeals at 370 F. 2d 297.

The pertinent facts underlying this controversy are undisputed, and are summarized by the Court of Appeals in its opinion, as follows:

Petitioners are engaged in the business of selling heating and air conditioning equipment, including gaseous refrigerants used in servicing air conditioning and refrigeration equipment. Petitioners do not manufacture the refrigerants they sell, but purchase the gases in pressurized cylinders of various sizes from concerns engaged in the business of manufacturing such refrigerants. As a matter of established practice, these manufacturers require distributors such as Petitioners to pay a deposit of

$12 per cylinder, which is refundable when the empty cylinder is returned to the manufacturer. The distributors are not obliged, however, to return the cylinders, and in the event a cylinder is not returned the manufacturer simply retains the deposit. Similarly, the distributors, including Petitioners, require their customers to pay, in addition to gas, a deposit of $12 per cylinder which is also refundable if and when the customer returns the empty cylinder. As in the case of the distributor, the customer is under no obligation to return the cylinders. It is standard practice in the trade for distributors to accept a return of empty cylinders and to refund the $12 deposits regardless of the source from which the customer acquired the cylinders and regardless of the manufacturer who produced them. Likewise, any distributor may return an empty cylinder in good condition to any manufacturer and receive the standard $12 deposit, even though the distributor may not deal in that particular line of refrigerants. The manufacturers then reuse those cylinders which are in good condition.

It is not unusual for one of Petitioners' customers to have need for an empty cylinder to be refilled by the customer at his own place of business, and in such case, the customer can obtain an empty cylinder from Petitioners simply by paying the standard $12 deposit. Thus, regardless of whether the cylinder is empty or full, the transaction is handled on the same refundable deposit basis—the customer may either retain the cylinder or return it for the deposit.

In June, 1960, Mobile Gas Service Corporation, one of Petitioners' customers, paid the standard $12 deposit and procured an empty cylinder from Petitioners, after which

time Petitioners had no further connection with the cylinder. After acquiring the empty cylinder, Mobile Gas Service Corporation changed the valve and filled the cylinder with ammonia gas for use in servicing refrigeration equipment. The cylinder, as modified, was used by Mobile Gas for approximately two years, during which time it was filled and refilled by Mobile Gas numerous times. In July 1962, however, the cylinder exploded, apparently as a result of exposure to the heat of the sun, injuring one Leon Phillips, an employee of Mobile Gas. In July 1963, Phillips instituted in the Alabama state courts a personal injury action against Petitioners, E. I. Dupont de Nemours & Company, and Kennic Chemical Company, the latter two defendants being the manufacturers and distributors of the cylinder.

The insurance policy in issue is styled "Comprehensive General Liability Policy" and contains the usual insuring agreements against bodily injury and property damage, various exclusions, declarations and conditions, and certain endorsements. Included among the endorsements is an "Exclusion of Products and Completed Operations Hazards," the interpretation of which represents the critical issue in this controversy. The endorsement provides in pertinent part as follows:

> (c) Products Hazard—The term "products hazard" means goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, if the injury, sickness, disease, death or destruction occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and if such injury, sickness, disease, death

> or destruction occurs away from premises owned, rented or controlled by the named insured or on premises for which the classification stated in division 1 of Item 4 of the declarations excludes any part of the foregoing; provided, such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine any property, other than such container, rented to or located for use of others but not sold.
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> * * *
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> 3. The policy does not apply to the products hazard . . . as defined herein.

It is undisputed that the injury was sustained away from Petitioners' premises, and the crucial inquiry thus was whether the cylinder in question constituted "goods or products manufactured, sold, handled or distributed" by Petitioners under the products hazard exclusion.

In defense of the trial court's conclusion that the cylinder was not a good or product sold, handled or distributed by Petitioners within the meaning of the endorsement, Petitioners contended that since the cylinder was acquired on a refundable deposit basis, title remained in the manufacturer and Petitioners transferred only a possessory license. Petitioners further urged that the term "goods and products" is limited to items sold by them or at least acquired to be sold as an integral part of their merchandise. However, "a review of Alabama law," says the Court of Appeals, "which governs in this diversity action, indicates that a refundable deposit transaction such as the one here involved constitutes the sale of goods." Moreover, reasoned the Court, to view

the instant trade practice as involving the mere transfer of a possessory license in the empty cylinder rather than a sale "is to disregard the realities of the transaction". Upon paying a deposit, a customer can obtain from Petitioners an empty cylinder entirely free from any further control by Petitioners, and free from any obligation to return it. The customer can use the empty cylinder as he wishes. He can, if he chooses, throw it away without incurring any further obligation to Petitioners or the manufacturer, or he can replace the valve and fill the cylinder with any type of refrigerant he wishes, as was done in the present case. "Obviously," concluded the Court, "neither party attributed any significance to the legal technicalities of retention of title."—370 F. 2d 297, 299, 300. The judgment of the district court in favor of Petitioners was, therefore, reversed.

Petitioners now seek certiorari to review the decision of the Court of Appeals on the ground that its decision (according to Petitioners) is contrary to the decisions of the Third Circuit in *Liberty Mutual Insurance Co. v. Hercules Powder Co.*, 224 F. 2d 293 (1955) and the Sixth Circuit in *Diversified Products Co. v. The Fidelity & Casualty Co. of New York*, 355 F. 2d 846 (1966). Petitioners state that the Fifth Circuit's ruling in the instant case is "diametrically opposed to the Third and Sixth Circuits."—page 4 of the Petition.

SUMMARY OF ARGUMENT

There is no conflict between the decisions of the Court of Appeals in this case and those of the Third and Sixth Circuits in *Liberty Mutual Insurance Co. v. Hercules*

Powder Co., supra, and *Diversified Products Co. v. The Fidelity & Casualty Co. of New York*, supra.

There is no important question of state law here, or any other special or important reason for reviewing this case. The decision is not erroneous and involves a matter of interest only to the litigants.

ARGUMENT

As noted by the Court of Appeals in this case, Petitioners during the proceedings below relied heavily upon *Hercules*, where the court ruled that an endorsement similar to the one here involved did not exclude policy coverage. In that case the insured, while engaged in a program of experimental research, had delivered an aluminum tube to an electro-chemical company for additional processing, after which time it was to be returned to the insured. In the course of additional processing at that company, the tube exploded. Determining that coverage was not excluded under the endorsement with regard to the claims arising out of the explosion, the Court reasoned that such endorsements were intended to avoid the type of products liability first developed in *MacPherson v. Buick Motor Company*, 1916, 217 N. Y. 382, 111 N. E. 1050. The court in *Hercules* concluded that such liability was clearly not in question since the tube had not been sent "into the channels of trade for use by others," but remained, at the time of the accident, a chattel owned by the insured to be returned to it at the completion of the processing. In view of such retention of ownership, the court ruled that the tube was not "manufactured, sold, handled or distributed" by the insured within the meaning of the exclusionary endorse-

ment. As noted by the Court of Appeals in its opinion in the instant case, however, the injured party's claim (the personal injury claim of Leon Phillips) is plainly couched in terms of products liability in the *MacPherson* sense, and having concluded that the transaction involving the empty cylinder did, in fact, constitute a sale under Alabama law, the court found the reasoning adopted by the Third Circuit in *Hercules* inapplicable to the facts of the present case.—370 F. 2d 297, 300, n. 1.

Respondent respectfully submits that *Hercules* and the present case are readily distinguishable factually. Here we have *MacPherson* products liability. In *Hercules* this was not in question. Here we have a sale. In *Hercules* there was none. The two decisions, therefore, do not conflict.

Diversified Products Company vs. The Fidelity & Casualty Co. of New York, supra, is like *Hercules*, factually distinguishable from the present case. Diversified Products Company is in the business of manufacturing automobile fibreboard panels. In 1958 it contracted with Ford Motor Company to supply armrests and quarter panels for the 1959 Ford Galaxie automobile. Diversified in turn agreed with Superwood Corporation that the latter would produce the armrests and quarter panels for Diversified. Superwood was to mold, press, and trim the parts involved. The trimming operation, however, required a punch press which Superwood did not possess. At Superwood's request, Diversified informed Superwood of several used presses available for purchase from suppliers in the area. Superwood thereafter selected and purchased one of the presses direct from a supplier. The press was delivered to Superwood's plant where it was

inspected and installed by Superwood's employees. No employee of Diversified participated in this. However, the dies were installed on the press by Superwood's employees under the supervision of Diversified's engineer, who subsequently made many trips to the plant for quality control purposes. On August 28, 1958, John Hutchinson, an employee of Superwood, was injured while operating the press. He instituted an action in the United States District Court, District of Minnesota, for damages for his injuries against the supplier of the press, the repairer, and Diversified. Diversified notified The Fidelity & Casualty Company, its insurer, however Fidelity refused to defend, claiming that the accident was within the "Products Hazard" exclusion clause of the policy. Diversified employed an attorney to defend it in the Hutchinson case, which was finally settled for approximately $40,000, of which Diversified contributed $10,500. Diversified then filed the subject action against Fidelity in the District Court for reimbursement, under the provisions of the policy, of the amount it paid in settlement and defense of the Hutchinson suit. The action was tried without a jury, and the District Court entered judgment against Fidelity, concluding that the "Products Hazard" exclusion did not apply to a phase or incident of the manufacturing process of Diversified. In affirming the judgment, the Court of Appeals stated:

> "We think the District Court correctly interpreted the policy. The purpose of products insurance undoubtedly was to afford protection against liability of manufacturers who send out their goods into the channels of commerce. The origin of such liability is the case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N. E. 1050, L.R.A. 1916F, 696.

"The express language of (g) (1) of the exclusion clause covers '* * * goods or products manufactured, sold, handled or distributed by the named insured * * *'

"*The press causing the injury was not a product of Diversified and was not manufactured, sold, handled, or distributed by it. Hence the accident did not come within the provisions of (g) (1) of the exclusion. Liberty Mut. Ins. Co. v. Hercules Powder Co., 224 F. 2d 293, 54 A.L.R. 2d 513 (3rd Cir., 1955).*

"'* * * Here the accident was not caused by a product of the insured, but by a press not manufactured or operated by it.

"The comprehensive policy issued by Fidelity was undoubtedly intended to insure Diversified against liability for all accidents except those involving its products or the service which it sells is connection therewith. In our judgment the scope of the exclusion clause should not be expanded so as to embrace accidents occurring in manufacturing operations of the insured, not caused by the products or service in relation to the sale or installation thereof. * * *'" (Emphasis supplied.)

In the present case we do not have any question as to whether the exclusionary endorsement should be expanded so as to embrace accidents occurring in manufacturing operations of the insured, not caused by products sold by the insured. As noted above, this, in substance, was the question before the Sixth Circuit in *Diversified*, and, we respectfully submit that Petitioners' assertion that the decisions are in conflict is unfounded.

As stated in Rule 19 of the Rules of this Court "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". There is no question of federal law invoyled here, nor has the Court of Appeals decided an important state or territorial question in a way in conflict with applicable state or territorial law. If there is any conflict between the decisions of the Fifth Circuit in this case, and those of the Third and Sixth Circuits in *Hercules* and *Diversified* (and Respondent respectfully submits there is not), it is as to a question controlled by state law, which, as pointed out by this Court in *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860, 82 L. ed. 1290 (1937), is ordinarily not a reason for granting certiorari.

CONCLUSION

The decision of the Fifth Circuit in this case is not erroneous or in conflict with the Third and Sixth Circuits, and Respondent prays that the Petition be denied.

Respectfully submitted,

THOMAS E. TWITTY, JR.
1301 Merchants National Bk. Bldg.
Mobile, Alabama 36601
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that the foregoing brief was served on Petitioners by mail, by depositing the same in a United States post office or mail box, with first class postage prepaid, properly addressed to each of Petitioners' counsel of record at his post office address.

THOMAS E. TWITTY, JR.
Attorney for Respondent